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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

MOHAWK REFINING CORPORATION, a corporation, and JOHN E. C. STROUD, C. KENNETH JOHNES, and WILLIAM L. ASHBY, individually and as officers of MOHAWK REFINING CORPORATION, *Petitioners*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which affirmed an order of the Federal Trade Commission requiring petitioners to cease and desist from selling and distributing in commerce lubricating oil re-refined from previously used lubricating oil without affirmatively disclosing to the purchaser the prior use of the raw material used in the re-refining process.

OPINIONS BELOW

The opinion of the Court of Appeals affirming the Federal Trade Commission cease and desist order is not yet reported, but is printed in the Appendix to this petition. The opinion and order of the Federal Trade Commission are not yet reported but are set forth at R. 37-42.[1]

JURISDICTION

The judgment of the Court of Appeals affirming the Federal Trade Commission's cease and desist order was entered March 3, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioners produce re-refined lubricating oils, which are finished motor oils refined in whole or part from previously used lubricating oils. The evidence is undisputed that petitioners' oils are identical in all respects, chemical and physical composition, quality, and utility, with finished motor oils refined wholly from crude or virgin oil, and cannot in any way be told apart from such oils. Petitioners' re-refined oils are sold and identified, like motor oils generally, as motor lubricating oils of specific Society of Automotive Engineers (SAE) viscosity grades, or with particular test specifications, and the raw materials from which they are refined are not indicated. Testimony was adduced by respondent that some dealers and members of the public felt a preference for oil refined from crude oil as against oil refined from previously used oil. These same witnesses generally indicated, however, that this preference was based upon their assumption that a product

[1] "R." references are to the Joint Appendix filed in the Court of Appeals.

made from a previously used material is inferior to a new product, and that it would disappear if the quality of the re-refined oil were in fact the same. These witnesses testified, moreover, that they chose particular motor oils in order to secure satisfactory motor lubrication for the price they could pay, and that they relied upon the brand name of the product and the integrity of the dealer from whom they bought to secure such a satisfactory product. Nevertheless, respondent asserts that the truthful and accurate identification of petitioners' products merely as "motor oils" is a false and deceptive practice under the Federal Trade Commisson Act, in that the public is allegedly misled by such identification into buying such products because of its mistaken belief that such products are "new oils", or oils refined from crude or virgin oil, and accordingly seeks to compel petitioners affirmatively to display and advertise that their motor oils are refined from previously used oil. On these facts, the following questions are presented:

1. When there is made no misstatement or misrepresentation as to the nature, composition, quality, or utility of petitioners' finished motor oils, and there is in fact no difference whatever in nature, composition, quality, or utility of finished oils whether refined from previously used lubricating oils or from crude or virgin oils, does silence as to the particular raw material source of petitioners' oils constitute a violation of the Federal Trade Commission Act so as to authorize an order compelling affirmative disclosure of such raw material source.

2. When a preference which is stated with respect to a product is not a factor inducing consumer purchase or rejection of such product, can failure to reveal facts

relating solely to such verbal preference constitute unfair competition or an unfair or deceptive practice under the Act? Or, put more broadly, can actions, claims, or omissions which do not induce consumer purchase or rejection constitute unfair competition or unfair and deceptive practices in commerce.

3. When a preference which is stated with respect to a product is grounded in a false assumption of its qualitative or utilitarian inferiority or difference, can such a groundless preference, even if it is an inducing factor in purchase or rejection of the product, be in itself a matter of public interest authorizing punitive or preventive action under the Federal Trade Commission Act, absent all other elements grounding such jurisdiction.

STATUTE INVOLVED

The pertinent provisions of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. 45) are as follows:

Sec. 5(a)(1) Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

Sec. 5(a)(6) The [Federal Trade] Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, . . . from using unfair methods of competition in commerce or unfair or deceptive acts or practices in commerce.

Sec. 5(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission

that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect. . . .

STATEMENT

This proceeding was initiated by complaint issued under Section 5 of the Federal Trade Commission Act, as amended, alleging that petitioners violated said Act by engaging in unfair competition and unfair and deceptive acts or practices which mislead the public to buy petitioners' motor oils under the mistaken belief that they are "new oils"; and seeking to compel petitioners to cease and desist from such alleged improper practices.

Petitioners are engaged in the business of refining, blending, compounding, selling and distributing motor lubricating oils, in one-quart and two-gallon containers, and in bulk, both for resale, and to oil blenders and industrial users of oils. (R. 76, 92-93; Resp. Exs. 1, 2, 3, 4, 5). The refining operation, a series of physical and chemical processes including filtration, dehydration, heat, acid, and clay treatments, performed upon a raw material which normally consists of crankcase drainings of previously used lubricating oils, results in a "new oil", identical in all respects, chemical and physical composition, quality, and utility, with any other motor oil, whatever the raw material source, including crude or virgin oil, of such other products. (R. 98-115, 257-260, 303-305, 308). Petitioners' finished oils, like lubricating oils generally, may be sold straight; or compounded with various additives to meet different engine performance requirements; or blended with other finished motor oils, refined either from pre-

viously used oil or from crude or virgin oil, in order to meet varying viscosity specifications established for motor lubricants by the Society of Automotive Engineers (SAE). (Id.) The SAE grade of finished motor oils possessing a certain viscosity is the same whether the raw material source of the finished oil is crude or virgin oil or is previously used lubricating oil. (R. Add. 1; Pet. Ex. 25). In sales of finished motor oils within the oil trade, and to large industrial users of oil, such oils are generally identified only by reference to their objective test specifications, and no identification of raw material source, whether from crude or previously used oil, is made, nor interest evinced therein. (R. 208-209, 216-217, 219-220, 267). The containers in which petitioners' products are sold contain various trade names, SAE grade designations, and statements such as "Quality Controlled by American Society of Testing Materials Approved Laboratory Tests", all of which designations and statements are true and accurate. (R. 230, 246-248)

Respondent relied upon the testimony of a few dealers and members of the public that they would normally assume that oil sold in cans like those used by petitioners was "new oil" (R. 45, 186), and that they felt a preference for "new oil" (R. 45, 147, 167, 171, 183, 202); and respondent concluded that by "new oil" was meant oil refined from crude or virgin oil as distinguished from oil refined from previously used oil (Resp. Opinion, R. 38). These same witnesses, however, generally indicated that they had a preference for "new oil" because they assumed that it was better in quality than oil made from previously used oil, and that they would feel no such preference if in

fact the quality of motor oil refined from previously used oil was the same as that of "new oil". (R. 137, 168, 174, 184, 193, 202-203). Respondent has held, however, that the quality of petitioners' oils was not material to the issues of the instant proceeding. (R. 34, 40).

Based upon this testimony, the respondent held that petitioners' omission to label their products as made from previously used motor oils misled the public into purchasing such products under the mistaken belief that they were refined from crude or virgin oil, and hence that such silence was unfair competition and an unfair or deceptive practice under the Act. An order thereupon issued directing petitioners to cease and desist from selling their products in commerce unless they affirmatively disclosed the prior use of the raw material from which their finished products were refined (R. 42).

The Court of Appeals below expressly stated that the fact that petitioners' oils are as satisfactory for lubricating purposes as oils produced from crude oil, though true, was beside the point, and, quoting from the opinion of this Court in *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, to the effect that a consumer has a right to secure the product of his choice, even if his choice is dictated by caprice or ignorance, affirmed the Commission's order.

REASONS FOR GRANTING THE WRIT

1. The Court Below, and the Federal Trade Commission, Have Extended to Distortion Prior Applicable Decisions of This Court, and Have Thus Improperly Decided an Important Question of Federal Law Which Has Not Been But Should be Settled by This Court.

The Commission seems to regard its authority under Section 5 of the Federal Trade Commission Act as broad enough to permit prohibition both of

> ". . . explicit misrepresentation and *failure to disclose by mark or label facts concerning merchandise, which, if known to prospective purchasers, would influence their decisions of whether or not to purchase . . .*" Brief of Respondent, filed in Court below, p. 21. (Emphasis supplied).

Such extreme authority to compel product labeling with information of whatever kind might be deemed to be of possible interest to prospective purchasers may be regarded by some as useful or desirable, but there is room for grave doubt whether Congress, in enacting Section 5, or the courts in construing and applying it, have thus broadly conceived its scope and purpose.

The courts have properly ruled that any affirmative misstatement, even as to matters unrelated to the quality or utility of the product, grounds governmental intervention under the Act to prevent continued misrepresentation. *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212 (false implication in company name that it was engaged in actual grinding of flour, whereas it was in fact only a jobber or distributor); *Federal Trade Commission* v. *Algoma Lumber Co., supra*, (sale of "yellow pine" under the name of "California white pine"); *Federal Trade*

Commission v. *Walker's New River Mining Co.*, 79 F. (2d) 457 (C.A. 4) (misleading implication in company name that its coal came from the "New River" coal field); *Haskelite Manufacturing Company* v. *Federal Trade Commission*, 127 F.(2d) 765 (C.A. 7) (advertising of lap trays surfaced with paper as having a hardwood surface). But in the instant case there has admittedly been no affirmative misstatement of any kind, either in the description of the product, its quality, utility, grade, source, or any other matter in connection therewith.

In many proceedings before it, the Commission has ruled that used products or parts sold in or incorporated into new packages under circumstances implying, even though not expressly stating, that the products themselves were wholly new, were being sold under a form of deception warranting prohibitive action. *Gilman Hat Company*, 17 F.T.C. Dec. 352 (used hat bodies, cleaned, blocked, and sold with new hat band); *A. S. Butler & Co.*, 31 F.T.C. Dec. 1011 (used glass jars, cleaned, packed in new cartons, and sold with new tops and rubber bands); *Federal Cordage Co., Inc.*, 49 F.T.C. Dec. 1312 (used manila rope fibers reclaimed and made into rope sold in containers marked "manila"); *M. & M. Spring Co.*, 50 F.T.C. Dec. 207 (used automobile spring parts sold with new cover). But in these cases the quality of the product or part after use was different from, and inferior to, the new product which it purported to be, and the Commission expressly so found as a fact and relied thereon. Here, however, the generally valid assumption that products deteriorate with use, which was applied in such cases, does not obtain. The evidence is uncontroverted that oil does not wear out with use but merely becomes

contaminated, and that re-refining restores it to its original characteristics as a motor oil (R. 251, 275); and hence that motor lubricating oil refined from previously used oil is identical in all respects with and wholly indistinguishable from motor lubricating oil refined from crude or virgin oil, as to composition, quality, and utility. See Opinion of Court below, App. 1a, Resp. Opinion, R. 38; R. 98-115.

In the *Algoma* case, *supra*, this Court, upholding a cease and desist order clearly grounded in overt misrepresentation of "yellow pine" as "white pine", met the argument that substantial equivalence in the utility of the two products prevented action under the Act, by enunciating the right of a consumer to protection against any misrepresentation or other hindrance in the free exercise of his buying choices, whether or not such choices were grounded in ignorance, or caprice, even if no substantive harm were involved in the denial of or substitution for his expressed choice. But crucial —by definition—to such right to protection is the fact of a consumer choice among various items on some basis which would induce the purchase or rejection of one or more of these items, however irrelevant or insubstantial from an objective point of view the choice-inducing factor might be. Only where, as in the cases cited above, the hindrance to free choice is created by overt misrepresentation or deception, whether verbal or by deliberate substitution of one product for a different, desired, product, has the specific exercise of a choice or an objectively meaningful basis therefor, not been required to be shown.

But here the evidence clearly demonstrated that, whatever the customer's verbal "preference" for oil refined from crude oil as distinguished from re-refined

oil, there was in fact no exercise of choice based on such factor, and that the factors inducing choice did not include considerations of raw material source; the choice-inducing factors were rather price, quality, brand-name, and the integrity of the dealer. (R. 50, 140, 154-156, 164-165, 173, 180-181, 186, 189, 197-198, 202, 270-272, 288-289.) In the face of absence of any overt misstatement, or evidence of inferiority or even difference between petitioners' products and so-called "new oils", the ruling here extends far beyond all prior rationales for prohibitive action under Section 5 of the Act, and in so doing dangerously distorts the purpose of the Act and unreasonably interferes with trade and business practices and relationships.

In essence, the Court below and the Commission hold that, absent any other basis for jurisdiction, seller-silence as to any question which any consumer might ask regarding a product, whether or not the question is asked and whether or not the answer would induce purchase or rejection of the product, whether or not it would reveal an objectively significant fact concerning the product, and whether or not it would expose or prevent imposition of an untruth, can and does constitute unfair competition and an unfair and deceptive act or practice thwarting the right of "choice" of the consumer. By so holding, this case translates the Federal Trade Commission Act into a super-labeling act, covering grades, quality, costs and any other factor in which the Commission might deem a consumer would have an interest, contrary to the intent and purpose of the Act.

This is the issue which deeply troubles Judge Breitenstein, dissenting in *Frank A. Kerran, et al.* v. *Federal Trade Commission*, No. 5850, (C.A. 10), de-

cided March 19, 1959, a case which is virtually a factual duplicate of the instant matter. (The opinion is not yet reported, and is reprinted in the Appendix hereto, p. 9a). The language in which Judge Breitenstein summarizes the effect of the decision therein is equally applicable here, that it compels

> "... a manufacturer [not only to] foresee caprice and ignorance and ... refrain from misrepresentation but also affirmatively [to] state every fact regarding his product which might conceivably be deemed important by the prejudiced and uninformed. ..." (App. 16a)

There is room for serious doubt whether this Court would have held the Algoma Lumber Company guilty of misrepresentation or deception if it had sold its products merely as "pine", and neither as "white pine" or as "yellow pine"; just as here petitioners truthfully and fully describe and sell their products as motor lubricating oil, and not as oil refined from crude oil. To permit seller-silence as to a product's raw material source, when it admittedly has no objective effect upon the composition, quality, or utility of the finished product, to ground injunction of such silence as a deceptive and illegal practice, and when no other basis for finding of misrepresentation or deception exists, is to expand the scope of Section 5 of the Act to encompass total control of all business advertising and sales methods, far beyond possible relation to prevention of genuine fraud or deception as originally contemplated thereby, and hence is to decide a question which this Court has not decided. The opinion of the Court below, and the divided opinions of the Court of Appeals for the Tenth Circuit sharply point the issue which this Court should decide, as seriously affect-

ing the proper scope of administrative authority under the Federal Trade Commission Act to control reasonable and truthful business practices.

2. The Doctrine Here Applied, That It Is in the Public Interest to Protect a Consumer in the Exercise of a Choice, Even if Such Choice Is Admittedly Grounded in a False Factual Assumption, Is of Very Questionable Propriety as a Basis for Governmental Control and Inhibition of Objectively Reasonable, Fair and Truthful Trade Practices, and Should be Reexamined and Limited by This Court.

If, contrary to fact, it should be assumed that the public has a genuine, choice-inducing preference for oil refined from crude oil as distinguished from re-refined oil, a basic question is raised under the Act whether it is in the public interest to protect such a preference even if it is in fact grounded in falsity.

Admittedly, if such a preference is actually expressed by a consumer, any thwarting thereof without disclosure is properly actionable.

The core of the issue here, however, relates to a silent preference, which the dealer at his peril is charged with ascertaining and honoring. Under such circumstances, the fact that the preference involved is factually groundless, that the preference is for Tweedledum as against Tweedledee, should weigh heavily in the determination whether, in meeting the requirements of the Act for exercise of injunctive jurisdiction, the public interest is affected. The public seeks, requests, secures, a motor oil; and whether that oil is derived from crude oil or from previously used oil, the product secured is, in all respects, that which the public has requested, and not merely one substantially equivalent thereto.

It is submitted that, within the contemplation of the Act, protection of factually unwarranted assumptions and preferences is not in the public interest: unless some affirmative action is taken to thwart consumer desire, or unless some actual product difference exists which, however, slightly, can cause or constitute objective prejudice or harm to the purchaser, or unless some clearly expressed public policy compels general recognition of the existence of a consumer preference;[2] and hence that such unwarranted assumptions and prejudices should not be protected.

The public interest is not well served by devotion of public funds, personnel, and time to harassment of truthful and legitimate small businesses under a statute basically designed to afford consumer protection against substantial fraud, when the ultimate effect of such governmental action is objectively meaningless. This Court should so instruct the Federal Trade Commission.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted.

SEYMOUR FRIEDMAN
Attorney for Petitioners

May, 1959

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[2] *Cf. L. Heller & Son, Inc.*, v. *Federal Trade Commission*, 191 F. (2d) 954 (C.A. 7), compelling disclosure of the foreign origin of products sold. Here, however, the assumption of a general preference is valid as a basis for action since it is expressed as a matter of national policy in the tariff laws requiring marking of imported goods. 19 U.S.C. 1304. *Cf.* Judge Breitenstein, dissenting, in *Frank A. Kerran* v. *Federal Trade Commission*, *supra*, App. 15a, 16a.